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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 802

ADDRIN COATES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on October 7, 1966.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix, infra) has not been reported as yet.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 7, 1966 (Appendix, infra), the Petition for a Rehearing denied on October 27, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

Whether in a conspiracy count pleading in the conjunctive violations of Title 21, U. S. Code, 174, and Title 26, U. S. Code, 4705 (a) of the narcotic law, a jury is sufficiently instructed where the trial Court reads the indictment and the pertinent portions of the statutes to the jury, but fails to instruct specifically that it was necessary for the jury to find that the narcotic drug was imported contrary to law and that the defendant knew of such illegal importation, and whether by such omission the charge was so lacking in explanation as to be fundamentally erroneous under the Plain Error Rule of the Federal Rules of Criminal Procedure.

STATUTES INVOLVED.

26 U. S. C. 4705 (a) provides:

General requirement.—"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

21 U. S. C. 174 provides:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates

the transportation, concealment, or sale of any such narcotic durg after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned", according to law.

* * * * * * * *

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

18 U. S. C. Rule 52 B provides:

"Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

STATEMENT.

Petitioner was convicted by a jury in the United States District Court for the Eastern District of Missouri under a three count indictment which charged him, along with his co-defendant, Dennis Aggers, with the sale of narcotics on June 30, 1965, and with the sale of narcotics on July 22, 1965, and with a conspiracy to receive, conceal, buy and sell heroin, knowing the same to have been illegally imported in violation of 21 U. S. C. 174, and to sell such drug to persons not in pursuance of a written order on prescribed form, in violation of 26 U. S. C. 4705 (a). Defendant Coates was found not guilty on Count I and guilty on Count III (conspiracy). The jury disagreed on Count II.

Bernice Taylor, a drug addict with a previous narcotic conviction (R. 21-22), entered into a narcotic purchase

arrangement with the defendants, Coates and Aggers, under the surveilance of narcotic agents. Mrs. Taylor testified that under the plan she would call Aggers and advise him of the amount of narcotics desired.

Aggers would then call at her apartment and collect the purchase price. Subsequently, defendant Coates would telephone Mrs. Taylor and advise that the narcotics had been placed in a public telephone booth at a specified location (R. 24-26).

On June 30, 1965, Aggers came to Taylor's apartment, collected $200.00 for the sale of heroin (R. 26-30), and a short time thereafter defendant Coates telephoned Bernice Taylor to pick up the heroin in a public telephone booth (R. 30-31).

On July 14, 1965, Taylor advised Aggers she wanted to purchase $400.00 of heroin. Defendant Coates telephoned that he would get it for her (R. 33-34). On July 22, 1966, Aggers came to Taylor's apartment, collected the $400.00, and a short time later, Coates telephoned her to pick up the heroin in another public telephone booth (R. 35-37).

All meetings between Aggers and Taylor in Mrs. Taylor's apartment and all telephone calls between the parties were monitored by Narcotic Agent Patch (R. 27-28 and R. 77-81).

After receiving these phone calls informing where the narcotics had been concealed, Mrs. Taylor and Agent Patch went to such places and took possession of the packages found there (R. 71 and 83).

The packages contained heroin as identified by a Government chemist (R. 117 and 120).

Each defendant took the witness stand in his own defense and denied any part in the alleged sales or any

part in connection with the conspiracy (R. 129-130 and 139-140).

At the close of the trial, defendant Coates did not raise the issue here under consideration either by exception to the instruction given or by request for instructions.

The Court below affirmed the conviction of the conspiracy count finding no errors or defects in the instructions affecting appellant's substantial rights within the meaning of the Plain Error Rule.

REASONS FOR GRANTING THE WRIT.

In a prosecution for receiving and concealing heroin, knowing it to have been unlawfully imported, the essential elements are: (1) receipt, concealment, or sale of heroin by the defendant; (2) unlawful importation of the heroin by someone; and (3) the defendant's knowledge of such unlawful importation. Harris v. U. S., 359 U. S. 19, 23, 79 S. Ct. 560.

In a criminal case, the defendant is entitled to have the jury instructed on all the elements that must be proved to establish the crime charged. U. S. v. Gilliam, 288 F. 2nd 796; Apex Distributing Co. v. U. S., 368 U. S. 821, 82 S. Ct. 38; Kelley v. U. S., 107 U. S. App. D. C. 122, 275 F. 2nd 10.

In the present case the trial court did not make it clear in his charge in relation to the conspiracy that it was necessary for the jury to find elements number two and three above, dealing with illegal importation and knowledge thereof. The Court simply read the pertinent portions of the statutes to the jury and the indictment in the case (R. 191-197), and defined the terms "conspiracy", "knowledge" and "unlawfully", in their general terms but without focus on "knowledge of the unlawful importation" aspect of the conspiracy that brings it within

the Federal jurisdiction (R. 197 and 202-211). The trial judge failed to instruct specifically that knowledge of illegal importation was a necessary element of the conspiracy. It did not explain or amplify this element to the extent necessary to enable the jury to apply the law of the facts.

The question is whether instructions which fail to instruct, specifically, that the defendant must have knowledge of the illegal importation, can rest on the necessary inclusion of that element by reason of a general definition of "knowingly", coupled with a reading of the indictment and the pertinent section of the Code.

U. S. v. Massiah, 307 F. 2nd 62, holds that an omission to charge that knowledge of illegal importation was a necessary element of the conspiracy to violate the narcotic law, was plain error requiring reversal. Hernandez v. U. S., 300 F. 2nd 114, 121, mentions that this element of "knowledge of illegal importation" required to make out a conspiracy violative of 21 U. S. C., Section 174, was the element essential to Federal jurisdiction.

If we are going to require that defendant make a request for amplification of this essential element before explicit instructions are given on this, and without such request the Court need not affirmatively instruct the jury on this element of knowledge, then the purported requirement that "in a criminal case, a Court should instruct on all essential questions of law involved in the case, whether requested or not", Kreiner v. U. S., 11 F. 2nd 722, 731 and Morris v. U. S., 156 F. 2nd 525, 527, would have no real substance. We would in effect be relieving the Court of this burden and thrusting this responsibility of clarifying the issues on the defendant.

In this connection it is difficult to accept the position that "the instructions considered as a whole" reflect that knowledge of unlawful importation is a necessary element

of conspiracy to violate section 174. Actually, it is far more probable that the mere reading of the phrase in the indictment and in the code "knowing the same to have been imported or brought into the United States contrary to law", without an affirmative instruction on this element of knowledge, tended to minimize its importance. This is so especially here where there was no direct evidence in the record in regard to illegal transportation. The jury was far more likely to suppose that the defendant, as a local narcotic offender, was not at all concerned with the primary source of the drug and would have no knowledge whatsoever as to its unlawful importation. Consequently, the Court's failure to make such an element specifically applicable to the charge at hand, would be interpreted by the jury as a deliberate one abrogating such requirement of proof as mere surplusage.

While it is true that no exception was taken to the trial Court's charge in this conviction and that normally the Court would under these circumstances not take note of the error under Rule 30, Federal Rules of Criminal Procedure, there are, nevertheless, exceptions to this rule where the error is so fundamental as not to submit to the jury an element of the offense. Screws v. U. S., 325 U. S. 91, 107, 65 S. Ct. 1031; U. S. v. Levy, 153 F. 2nd 995, 998-99, and Rule 52B of the Federal Rules of Criminal Procedure:

"Plain Error. Plain errors or defects affecting substantial rights may be noticed, although they are not brought to the attention of the Court."

Here we are dealing with a fundamental omission affecting substantial rights under the above rule. Section 174 of 21 U. S. Code, requires a finding of unlawful importation and defendant's knowledge thereof as elements essential to Federal jurisdiction. Hernandez v. U. S., supra. And the question whether a specific finding of

such elements are necessarily included in a jury charge by reason of the reading of the phrase from the indictment and code "knowing the same to be imported or brought into the United States contrary to law in violation of Title 21, U. S. C. 174 (R. 192 and 194), is a question of vital importance in the enforcement of the narcotic laws and in the administration of the rule which requires a Court to instruct on all essential questions of law involved in the trial of a particular criminal case.

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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